Franky Construction Sdn Bhd v MEC Industrial Park Sdn Bhd

HIGH COURT (KUANTAN) — APPLICATION FOR EXECUTION NO 37–6 OF 1998
RAMLY ALI J
12 JUNE 2002

Civil Procedure *— Pleadings — Striking out — Writ of seizure and sale and prohibitory order — Application to strike out through a special administrator duly appointed by Danaharta — Whether the renewal and extension of prohibitory order was an abuse of the process of the court*

Civil Procedure *— Locus standi — Directors — Whether powers of special administrator appointed by Danaharta wider than the powers of the board of directors for a company — Whether the special administrator has locus standi to initiate application to strike out the writ of seizure and sale — Whether applications made after appointment of the special administrator null and void if consent of Danaharta Corporation not obtained*

The plaintiff obtained a summary judgment against the defendant for a sum of RM8,936,493.26 with interest at the rate of 8% until full satisfaction and costs. In addition, the plaintiff filed for a writ of seizure and sale against the defendant for the purpose of enforcing the said summary judgment. The writ of seizure and sale and a prohibitory order were accordingly issued by the court in respect of properties held by the defendant and were granted extensions on the applications made by the plaintiff. In the meantime, the defendant was placed under Danaharta. This is an application by the defendant through a special administrator duly appointed by Danaharta to strike out the writ of seizure and sale and prohibitory order obtained by the plaintiff.

Held, allowing the application with costs:

(1) The Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act') is an extraordinary Act of Parliament with special provisions and special powers given to Danaharta for special purposes. The Act is to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by Danaharta Corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by Danaharta and for matters connected therewith or incidental thereto. Therefore, it was necessary for all concerned including the courts to interpret the provisions of the Act along the missions that the Act wished to achieve. That was the intention of the legislature in enacting the Act and that was the background that the Act should be given due recognition (see p 221A–B, F–G).

(2) The argument that the special administrator had no locus standi to initiate the application was unsustainable and without merit.

The powers of the special administrator provided under the Act were wider than the powers of a board of directors for a company. The special administrator had vested powers provided in the Second Schedule of the Act. These powers provided the power to remove or suspend from office any director of the affected person or appoint other persons to act as directors. The special administrator also had the powers to perform any function and exercise any power that the affected person or any of its director or officers could perform or exercise if a special administrator had not been appointed. Therefore, the Act clearly empowered the special administrator to initiate the application in the name and on behalf of the defendant through the service of a solicitor appointed for that purpose (see pp 222I–223E).

(3) The writ of seizure of sale could only be implemented by the sale of land in question when a prohibitory order is in force. The prohibitory order applied by the plaintiff was the first step to enforce a judgment over the assets of the defendant and also a proceeding or other legal process against the defendant (see pp 223I, 224E); *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116, *Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors* [1991] 2 MLJ 327 and *Keystart Sdn Bhd v Forgetech Sendirian Bhd* [1998] 2 AMR 1280 followed.

(4) The life of a prohibitory order unless extended by order of a court shall be six months from the date thereof. An extension of the said prohibitory order shall not have effect until copy thereof is presented for registration before a prohibitory order lapses. The renewal or extension of the prohibitory order was essential in order not to interrupt the continuity of the validity of the prohibitory order. If the continuity was interrupted and the prohibitory order lapsed then the sale of the land in the execution proceeding could not be carried out. The legal process or the execution proceeding in the case was commenced before the appointment of the special administrator and therefore, the applications to renew or to extend the prohibitory order were considered as continuation of the proceeding. However, if the applications were made after the appointment of the special administrator, it must then be with the prior consent of Danaharta Corporation (see pp 224H, 225B–F); *Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors* [1991] 2 MLJ 327 followed.

(5) It is trite law that the consent required for any application must be given by Danaharta Corporation only and there could be no other substitution from any other person or authority. Failure on the part of the plaintiff to obtain the prior written consent of Danaharta Corporation would result in the applications and the relevant orders be null and void (see pp 225H–226A).

(6) The existence of 'special circumstances' was only relevant in cases where the applications were made in ordinary situation where the judgment debtor had not been placed under Danaharta as provided in the Act. In cases where the judgment debtor had been placed under the Danaharta and special administrator had been duly appointed, the issue of 'special circumstances' became irrelevant (see p 226D–E). A B

(7) The court agreed that as long as the writ of seizure and sale and the prohibitory order were still on the register of the document of title of the said land in question, the proposal prepared and duty bound to be implemented by the special administrator, would not be fully and effectively carried out. It might defeat the purpose of the Act and the intention of the legislature if that were to happen (see p 227C–D). C

(8) By not informing the court the actual position of the land and proceeded to apply for the renewal and extension of the prohibitory order in respect of all those land, the plaintiff was abusing the process of the court. The court found that the plaintiff or the solicitors acting for the plaintiff knew that a special administrator has been appointed for the defendant and yet the plaintiff claimed that they had no knowledge about the appointment. This clearly showed that the plaintiff was not sincere and not bona fide in dealing with this matter. This could be considered as an abuse of the process of the court (see pp 227G–228A). D E

(9) The prohibitory order that was renewed or extended by the plaintiff was a collateral purpose in maintaining the status quo in order to give or preserve the plaintiff's right to take appropriate action at the appropriate time against Danaharta and/or the special administrator for non-compliance with the express provisions of the Danaharta Act and not for the purpose of an execution of a judgment by way of seizure and sale. This was an abuse of the process of the court (see p 229D–E). F

(10) The process of the court must be used bona fide and must not be misused. The court will prevent the improper use of the court process and will in a suitable case do so summarily where it had been used vexatiously and oppressively (see p 229F–G); *Castro v Murray* (1875) 10 Ex 213 *v Prince Edward of Saxe Weimare* (1876) 1 Qbd 499 and *Keystart Sdn Bhd v Forgetech Sdn Bhd* [1998] 2 AMR 1280 followed. G H

[Bahasa Malaysia summary

Plaintif telah mendapat satu penghakiman terus terhadap defendan bagi jumlah RM8,936,493.26 berserta faedah pada kadar 8% sehingga bayaran penuh dan kos. Selain itu, plaintif telah memfailkan satu writ penyitaan dan jualan terhadap defendan bagi tujuan I

menguatkuasakan penghakiman terus tersebut. Writ penyitaan dan jualan dan satu perintah larangan dengan wajarnya telah dikeluarkan oleh mahkamah berhubung hartanah-hartanah yang dipegang oleh defendan dan telah diberikan lanjutan masa atas permohonan-permohonan yang dibuat oleh plaintif. Sementara itu, defendan telah diletakkan di bawah Danaharta. Ini adalah satu permohonan oleh defendan melalui seorang pentadbir khas yang telah dilantik oleh Danaharta untuk membatalkan writ penyitaan dan jualan dan perintah larangan yang telah diperolehi oleh plaintif.

Diputuskan, membenarkan permohonan tersebut dengan kos:

(1) Akta Pengurusan Danaharta Nasional Bhd 1998 ('Akta tersebut') adalah satu Akta Parlimen yang luar biasa dengan peruntukan-peruntukan dan kuasa-kuasa khas yang diberikan kepada Danaharta bagi tujuan-tujuan khas. Akta tersebut memperuntukkan undang-undang khas untuk perolehan, pengurusan, pembiayaan dan pelupusan aset-aset dan liabiliti-liabiliti oleh Danaharta Corporation, pelantikan pentadbir-pentadbir khas yang mempunyai kuasa-kuasa untuk mentadbir dan menguruskan seseorang yang mana aset-aset atau liabiliti-liabilitinya telah diperolehi oleh Danaharta dan bagi perkara-perkara yang berkaitan atau berhubungan dengannya. Oleh itu, adalah perlu untuk semua yang berkaitan termasuklah mahkamah untuk menafsir peruntukan-peruntukan Akta tersebut bersesuaian dengan misi-misi yang ingin dicapai oleh Akta tersebut. Ini merupakan hasrat perundangan dalam menggubal Akta tersebut dan ia adalah latar belakang yang Akta tersebut patut berikan pengiktirafan (lihat ms 221A–B, F–G).

(2) Hujah bahawa pentadbir khas tersebut tidak mempunyai locus standi untuk memulakan permohonan tersebut tidak boleh kekal dan tanpa merit. Kuasa-kuasa pentadbir khas yang diperuntukkan di bawah Akta tersebut lebih luas daripada kuasa-kuasa lembaga pengarah sebuah syarikat. Pentadbir khas mempunyai kuasa-kuasa sedia ada yang diperuntukkan dalam Jadual Kedua Akta tersebut. Kuasa-kuasa berikut memperuntukkan kuasa untuk memecat atau menggantung dari jawatan mana-mana pengarah orang yang terkilan atau melantik orang lain untuk bertindak sebagai pengarah. Pentadbir khas juga mempunyai kuasa untuk melaksanakan apa-apa fungsi dan menggunakan apa-apa kuasa yang mana orang yang terkilan atau mana-mana pengarah atau pegawainya boleh laksana atau gunakan jika seorang pentadbir khas tidak dilantik. Oleh itu, Akta tersebut dengan jelas memberi kuasa kepada pentadbir khas untuk memulakan permohonan tersebut atas nama dan bagi pihak defendan melalui khidmat seorang peguamcara yang telah dilantik bagi tujuan tersebut (lihat ms 222I–223E).

(3) Writ penyitaan dan jualan hanya boleh dilaksanakan oleh jualan tanah yang dipersoalkan apabila satu perintah larangan telah berkuatkuasa. Perintah larangan yang dipohon oleh plaintif adalah langkah pertama untuk menguatkuasakan satu penghakiman ke atas aset-aset defendan dan juga satu prosiding atau proses perundangan lain terhadap defendan (lihat ms 223I, 224E); *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116, *Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors* [1991] 2 MLJ 327 dan *Keystart Sdn Bhd v Forgetech Sendirian Bhd* [1998] 2 AMR 1280 diikut.

(4) Jangka hayat satu perintah larangan kecuali jika dilanjutkan oleh perintah mahkamah adalah enam bulan daripada tarikh dikeluarkan. Satu lanjutan masa perintah larangan tidak sepatutnya berkuatkuasa sehingga sesalinannya dikemukakan untuk pendaftaran sebelum satu perintah larangan luput. Pembaharuan atau lanjutan perintah larangan adalah penting agar tidak mengganggu kesahihan berterusan perintah larangan tersebut. Sekiranya kesinambungan tersebut terganggu dan perintah larangan tersebut luput maka jualan tanah dalam prosiding pelaksanaan tidak dapat dijalankan. Proses perundangan atau prosiding pelaksanaan dalam kes ini telah dimulakan sebelum perlantikan pentadbir khas dan oleh itu, permohonan-permohonan untuk memperbaharui atau melanjutkan perintah larangan tersebut dianggap sebagai sambungan prosiding tersebut. Namun begitu, jika permohonan-permohonan tersebut dibuat selepas perlantikan pentadbir khas tersebut, ia perlu mendapatkan kebenaran terdahulu daripada Danaharta Corporation (lihat ms 224H, 225B–F); *Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors* [1991] 2 MLJ 327 diikut.

(5) Adalah undang-undang lapuk di mana kebenaran yang diperlukan untuk apa-apa permohonan mestilah diberikan oleh Danaharta Corporation sahaja dan tidak boleh terdapat apa-apa penggantian daripada mana-mana orang atau pihak berkuasa. Kegagalan di pihak plaintif untuk mendapat kebenaran bertulis terdahulu daripada Danaharta Corporation akan mengakibatkan permohonan-permohonan dan perintah-perintah berkaitan batal dan tidak sah (lihat ms 225H–226A).

(6) Kewujudan 'keadaan-keadaan khas' hanya relevan dalam kes-kes di mana permohonan-permohonan telah dibuat dalam keadaan biasa di mana penghutang penghakiman tidak diletakkan di bawah Danaharta sebagaimana yang diperuntukkan dalam Akta tersebut. Dalam kes-kes di mana penghutang penghakiman telah diletakkan di bawah Danaharta dan pentadbir khas telah dilantik dengan sewajarnya, persoalan 'keadaan-keadaan khas' tersebut menjadi tidak relevan (lihat ms 226D–E).

(7) Mahkamah bersetuju selagi writ penyitaan dan jualan dan perintah larangan tersebut masih atas daftar dokumen hakmilik tanah yang dipersoalkan, cadangan yang disediakan dan kewajipan yang terikat untuk dilaksanakan oleh pentadbir khas, tidak akan dilaksanakan sepenuh dan secara efektif. Ia mungkin tidak menepati tujuan Akta tersebut dan hasrat penggubal jika ia berlaku (lihat ms 227C–D).

(8) Dengan tidak memaklumkan kepada mahkamah kedudukan sebenar tanah tersebut dan terus memohon untuk pembaharuan dan lanjutan perintah larangan berhubung semua tanah tersebut, plaintif telah menyalahgunakan proses mahkamah. Mahkamah mendapati bahawa plaintif atau peguamcara yang bertindak bagi pihak plaintif mengetahui bahawa seorang pentadbir khas telah dilantik bagi pihak defendan dan begitupun plaintif telah mendakwa mereka tidak mempunyai apa-apa pengetahuan tentang perlantikan tersebut. Ini jelas menunjukkan bahawa plaintif tidak ikhlas dan tidak bona fide dalam mengendalikan perkara ini. Ini boleh dianggap sebagai satu penyalahgunaan proses mahkamah (lihat ms 227G–228A).

(9) Perintah larangan yang telah diperbaharui atau dilanjutkan oleh plaintif adalah bertujuan kolateral untuk mengekalkan status quo bagi tujuan memberi atau mengekalkan hak plaintif untuk mengambil tindakan yang sesuai pada masa yang sesuai terhadap Danaharta dan/atau pentadbir khas kerana ketidakpatuhan dengan peruntukan-peruntukan yang nyata dalam Akta Danaharta dan bukan bagi tujuan satu pelaksanaan satu penghakiman melalui sita dan jualan. Ini adalah satu penyalahgunaan proses mahkamah (lihat ms 229D–E).

(10) Proses mahkamah harus digunakan bona fide dan tidak harus disalahgunakan. Mahkamah akan menghalang penggunaan salah terhadap proses mahkamah dan akan dalam kes yang sesuai menyelesaikan secara terus di mana ia telah digunakan secara menyusahkan dan menindas (lihat ms 229F–G); *Castro v Murray* (1875) 10 Ex 213 *v Prince Edward of Saxe Weimare* (1876) 1 QBD 499 dan *Keystart Sdn Bhd v Forgetech Sdn Bhd* [1998] 2 AMR 1280 diikut.]

Notes

For cases on locus standi generally, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3924–3981.

For cases on striking out of pleadings generally, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4377–4902.

Cases referred to

Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors [1991] 2 MLJ 327 (folld)

Castro v Murray (1875) 10 Ex 213 (folld)
Dawkins v Prince Edward of Saxe Weimar (1875–1876) 1 QBD 499 (folld)
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (folld)
Keystart Sdn Bhd v Forgetech Sdn Bhd [1998] 2 AMR 1280 (folld)

Legislation referred to

Companies Act 1965 s 176(10)
National Land Code s 338(1)
Pengurusan Danaharta Nasional Berhad Act 1998 ss 23, 24, 30, 41(1)(d)(ii), (e), (3), (7), (8), 42(2), 44, 45(2), 46(4), 47(2), (3), 48
Rules of the High Court 1980 O 47 r 6(5), O 43 r 11

R Sarengapani (*Vendargon & Partners*) for the plaintiff.
Johnston Yap (*Yap & Co*) for the defendant.

Ramly Ali J: Enclosure 62 is an application by the defendant, through a special administrator duly appointed by Danaharta under the Pengurusan Danaharta Nasional Berhad Act 1998 ('Danaharta Act') to strike out the writ of seizure and sale dated 6 October 1998 and the prohibitory order dated 16 October 1998 obtained by the plaintiff. The defendant relies primarily on s 41 of the Danaharta Act 1998 (as amended in 2000) which prohibits execution of judgment on any asset of the affected person without the prior written consent of Danaharta.

Factual background

The plaintiff had, vide Kuantan High Court, Civil Suit No 22–35–1998, obtained a summary judgment against the defendant on 21 September 1998 for a sum of RM8,936,493.26 together with interest at the rate of 8%pa from 20 April 1998 until full satisfaction and costs. On 4 October 1998, the plaintiff filed for a writ of seizure and sale against the defendant for the purpose of enforcing the said summary judgment. Accordingly, a writ of seizure and sale was issued on 6 October 1998 and a prohibitory order was also issued on 16 October 1998, in respect of the following properties held by the defendant under:

(a) PN 2807, Lot 49647, Mukim Kuala Kuantan;
(b) PN 2808, Lot 49648, Mukim Kuala Kuantan;
(c) PN 2809, Lot 49649, Mukim Kuala Kuantan;
(d) PN 2816, Lot 49656, Mukim Kuala Kuantan; and
(e) PN 2817, Lot 49657, Mukim Kuala Kuantan.

The said prohibitory order was duly registered on 17 October 1998 vide Perserahan No 1552/1998. The said writ of seizure and sale was extended every one year and the last extension was granted vide a court order dated 28 September 2001, whereby it was further extended until

4 October 2002. Similarly the prohibitory order was also extended every six months and the last extension was granted vide a court order dated 28 September 2001, whereby it was further extended until 2 April 2002 under s 338(1) of the National Land Code and O 47 r 6(5) of the Rules of the High Court 1980. All the extensions were granted on the applications made by the plaintiff.

In the meantime, the defendant was placed under Danaharta. On 9 September 1999 a special administrator was duly appointed by Danaharta under the relevant provisions of the Danaharta Act to administer the defendant. Relying on the provisions of s 41(1)(d) and (e) of the Danaharta Act, the special administrator filed an application vide encl 62 for the following orders:

(1) that the writ of seizure and sale dated 6 October 1998 filed by the plaintiff vide application for Execution No 37–6–98 against the defendant be set aside and/or cancelled forthwith;

(2) that the prohibitory order dated 16 October 1998 in respect of the defendant's land held under PN 2807, Lot 49647 and PN 2808, Lot 49648 (both in Mukim Kuala Kuantan), which was extended until 4 October 2002 vide a court order dated 28 September 2001, be set aside and/or cancelled forthwith;

(3) that the court order dated 28 September 2001 granting further extension on the said prohibitory order is of no effect and to be set aside;

(4) that any proceeding or order giving further extension to the said prohibitory order dated 16 October 1998 and any sale, transfer or disposal of the land in question by virtue of the said prohibitory order is null and void 'and should be set aside or cancelled.

The grounds for the said application are as follows:

(a) a special administrator for the defendant was appointed by Danaharta having the effect under s 41 of the Danaharta Act;

(b) the court order dated 28 September 2001 granting further extension to the writ of seizure and sale as well as the prohibitory order was not valid as it contravened s 41 of the Danaharta Act;

(c) the said extension which was registered on 2 October 2001 vide Perserahan No 3628/2001 was invalid and void as the prohibitory order dated 16 October 1998 had lapsed on 26 March 2001;

(d) a proposal for the creditors of the defendant prepared by the special administrator pursuant to s 44 of the Danaharta Act has been approved for implementation by Danaharta under s 45(2) of the same Act;

(e) all application by the plaintiff to further extend the validity of the prohibitory order after the appointment of the special administrator is an abuse of court process.

Submission by the defendant

In supporting the application vide encl 62, the defendant argued that any application to extend the validity of the prohibitory order after the appointment of the special administrator for the defendant is prohibited by s 41(1)(d)(ii) and (e) of the Danaharta Act because the application is considered as a step to execute the judgment obtained against the defendant, unless the plaintiff has obtained a prior written consent of Danaharta.

The defendant also argued that the special administrator pursuant to s 44 of the Danaharta Act has prepared a 'Working Proposal' for the creditors of the defendant and the said proposal was approved by Danaharta for its implementation under s 45(2) of the Danaharta Act. The defendant argued that the said proposal could not be effectively implemented unless the said prohibitory order obtained and registered by the plaintiff is set aside or cancelled.

The defendant also submitted that the plaintiff has failed to prove the existence of any special circumstances in applying for the extension of the prohibitory order and further submitted that each of the application made was an abuse of the court process.

Submission by the plaintiff

In opposing the defendant's application, the plaintiff raised the following arguments:

(1) that the said writ of seizure and sale as well as the prohibitory order were duly in force in October 1998, well before any vesting of rights in Danaharta. Therefore the operation of s 41 of the Danaharta Act cannot be retrospective in effect. Subsequent application for renewal or extension of the prohibitory order and the writ is not an execution or steps to execute the judgment but only to maintain the status quo. Therefore the extensions are not caught by the Danaharta Act particularly s 41, as they are not executions of judgment;

(2) that at all times, the defendant was represented by the legal firm of Tetuan Haniff and Rajendran who has consented to all extensions of the writ as well the prohibitory order. The consent order remained valid until set aside by fresh action by the defendant;

(3) that the Danaharta Act does not vest the special administrator with the powers to make the present application. Therefore the special administrator has no locus standi to make the present application;

(4) that the plaintiff's purpose in maintaining the status quo is to give and preserve the plaintiff's right to take action at the appropriate time against Danaharta and/or the special administrator for non-compliance with the express provisions of the Danaharta Act.

Findings of the court

In the present application, we are dealing mainly on the provisions of the Danaharta Act 1998 which came into force on 1 September 1998 and later amended in 2000. First and foremost, I have to stress here that the Danaharta Act itself is an extraordinary Act of Parliament with special provisions and special powers given to Danaharta for special purposes. The Act itself is to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by Danaharta Corporation; the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by Danaharta and for matters connected therewith or incidental thereto.

The preamble to the Danaharta Act clearly provides that special provisions are required in the public interest to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises to promote the revitalization of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities. It is also stated in the preamble of the Act that the legislation is the only means by which the acquisition, management, financing and disposition of assets and liabilities can be implemented promptly, efficiently and economically for the public good; and that legislation is the only means by which special administrators may be appointed expeditiously to administer and manage persons whose assets and liabilities have been so acquired by Danaharta. Therefore, it is not surprising that the Danaharta Act contain special provisions with special powers to enable Danaharta and the special administrators to achieve the purpose of the Act, particularly at times when the country is facing economic and financial turbulence. We are still in the process of recovering and Danaharta and the special administrators still have a long way to complete their missions as entrusted by the Danaharta Act. Therefore it is necessary for everybody, including the court, to interpret the provisions of the Danaharta Act along the missions which the Act wishes to achieve. That is the intention of the legislature in making the said Danaharta Act and that is the background that the Act should be given due recognition.

Whether special administrator has locus standi to initiate the present application

A special administrator is appointed for the affected person or company, (in the present case, the defendant), either under s 23 or 24 of the Danaharta Act where Danaharta is satisfied that the affected person is unable or likely to be unable to pay its debt, or is unable or likely to be unable to fulfill its obligations to its creditors. The appointment is affected if Danaharta is satisfied that it would serve public interest to do so; or the survival of the affected person and its assets as a going concern; or a more advantageous realization of the affected person's assets would be achieved than on a winding up. Once appointed, the provision of the s 41 of the Danaharta Act will come into effect. A moratorium of 12 months shall take effect [s 41(2)].

The duration of the moratorium can be further extended by Danaharta for a further period of 12 months or the duration required to complete the implementation of the proposal approved under ss 46 or 48 as the case may be, in which case it may be more than 12 months [s 41(3)]. The effect of the appointment of a special administrator is provided under s 41(1) of the Danaharta Act which reads as follows:

> Subject to sub-s (6), on the appointment of the special administrator, a moratorium shall take effect during which —
>
> (a) any petition for the winding up of the affected person shall be dismissed by the court;
>
> (b) no resolution may be passed or order made for the winding up of the affected person;
>
> (c) no receiver, receiver and manager or provisional liquidator, except any receiver, receiver and manager or provisional liquidator appointed by the relevant regulatory body in respect of any of the persons referred to in paragraph 27(c), may be appointed, or if appointed, his appointment shall immediately cease and he shall vacate his office;
>
> (d) no steps may be taken —
>
> (i) to create, perfect or enforce any security over any asset of the affected person;
> (ii) to enforce a judgment over any asset of the affected person;
> (iii) to re-possess any asset in the possession, custody or control of the affected person; or
> (iv) to set off any debt owing to the affected person in respect of any claim against the affected person,
>
> except with the prior written consent of the corporation;
>
> (e) no proceedings and no execution or other legal process may be commenced or continued with, and no distress may be levied against the affected person or its assets except with the prior written consent of the corporation;
>
> (f) any application made under s 176 of the Companies Act 1965 shall b adjourned sine die and any restraining order issued pursuant to sub-s 176(10) of the Companies Act 1965 shall be immediately discharged and set aside; and
>
> (g) no proceedings and no execution or other legal process may be commenced, or continued with, against any person providing a guarantee or acting as a guarantor for the liability of the affected person except with the prior written consent of the Corporation.

The plaintiff argued that the defendant company continues to exist after the special administrator was appointed and its board of directors continues to function. The plaintiff further argued that the special administrator appointed under the Danaharta Act only has the powers to deal with the assets of the company, but the appointment does not vest the special administrator with the powers of the board of directors (as in the case of winding up). Therefore, the plaintiff concluded that the special administrator in the present case has no locus standi to initiate the present application.

I think the plaintiff's contention on this issue is unsustainable and without merit. The powers of the special administrator provided under the Danaharta Act are very wide — much wider than the powers of a board of directors for a company in the ordinary sense. Section 30 of the Danaharta Act provides that the special administrator shall have the powers in the Second Schedule. There are 26 items listed under the Second Schedule regarding the powers of the special administrator. These powers include the power to remove or suspend from office any director of the affected person or appoint other persons to act as directors of the affected person notwithstanding the memorandum and articles of association of the affected person or any other law (para 2 Second Schedule). Obviously, this particular power is much wider than the powers of the board of directors of a company as provided under the memorandum and articles of association, the Companies Act 1965 as well as other law. Besides that, the special administrator also has the powers to perform any function and exercise any power that the affected person or any of its director or officers could perform or exercise if a special administrator had not been appointed. Paragraph 7 and 8 of the Second Schedule provide the special administrator with the following powers:

> 7 Power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions.
>
> 8 Power to bring or defend any action or other legal proceedings in the name and on behalf of the affected person.

Paragraphs 7 and 8 (above) clearly empowers the special administrator to initiate the present application (encl 62) in the name and on behalf of the affected person ie the defendant company, through the service of a solicitor appointed for that purpose.

Whether s 41 is applicable

The defendant relied primarily on s 41(1)(d)(ii) and (e) of the Danaharta Act which prohibits execution of a judgment on any asset of the affected person (the defendant) without the prior written consent of Danaharta. Section 41(1)(d)(ii) provides that during the duration of the moratorium period, no steps may be taken to enforce a judgment over any asset of the affected person except with the prior written consent of Danaharta Corporation. Section 41(1)(e) further provides that no proceedings, execution or other legal process may be commenced or continued with, and no distress may be levied against the affected person or its assets except with the prior written consent of Danaharta Corporation.

The question now is whether issuance and renewal of a prohibitory order can be considered as a 'step to enforce a judgment over the assets of the defendant'. Or can it be considered as a 'proceeding or execution or other legal process' against the defendant. Decided cases have clearly shown that a prohibitory order is the first step in execution proceedings. The writ of seizure and sale can only be implemented by the sale of the land in question only when a prohibitory order is in force. In *Karuppiah Chettiar*

v Subramaniam [1971] 2 MLJ 116, the Federal Court has held at p 121, that:

> It has to be borne in mind that the issue and the endorsement on the register document of title of a prohibitory order are but the first step in execution proceedings. The next step in the proceedings is for the judgment creditor to apply for the sale of the land under O 43 r 11.

In *Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors* [1991] 2 MLJ 327, it was held at p 327, that:

> The combined effect of the relevant provisions in the Rules of the High Court 1980 and the National Land Code 1965 is that a sale of land in attachment proceedings must be carried out only when a prohibitory order registered against it, is in force. A void prohibitory order would vitiate the order for sale. The position is no different from where there has been no renewal of the prohibitory order.

In another case, *Keystart Sdn Bhd v Forgetech Sdn Bhd* [1998] 2 AMR 1280, the High Court in Kuching has also held that 'the issue and the endorsement on a register document of title of a prohibitory order, are the first steps in execution proceedings, following which the application for the sale of the land is to be made.' It was also decided in that case that 'as provided by the Rules of the High Court, a prohibitory order could only be issued in execution of a judgment or order, involving the seizure of any immovable property of a judgment debtor.

On those authorities as well the fact of the present case, I am fully satisfied that the prohibitory order applied by the plaintiff in this case is a 'step to enforce a judgment' (ie the judgment obtained against the defendant on 21 September 1998) over the assets of the defendant. It is also a 'proceeding or other legal process' against the defendant.

The plaintiff argued that s 41 of the Danaharta Act does not apply because the writ of seizure and sale and the prohibitory order were duly in force since October 1998, well before any vesting of right in the special administrator, who was only appointed on 9 September 1999. Therefore the plaintiff argued that the Danaharta Act cannot be retrospective in effect. The plaintiff further argued that all the subsequent renewal or extension of the said writ and prohibitory order are not to execute or to take steps to execute the judgment but merely to maintain the status quo, and therefore are not caught by s 41 of the Danaharta Act.

With respect, I cannot agree with the above arguments of the plaintiff. The life of a prohibitory order, unless extended by order of a court, shall be six months from the date thereof. An extension of the said prohibitory order shall not have effect until a copy thereof is presented for registration before a prohibitory order lapses. In *Ban Hin Lee Credit* case, Edgar Joseph Jr has ruled at p 331 that:

> Similarly, if a judgment creditor fails to obtain an order of court extending the life of a prohibitory order and it expires it will be ineffective to authorize the seizure of the land or the interest therein for sale.

A At p 332, his Lordship went on:

> I need hardly say that any of those orders if void would vitiate the order for sale since this would interrupt the continuity of the life of the prohibitory order. The position therefore is no different from a case where there has been no renewal of a prohibitory order.

B I have concluded earlier that the issuance of a prohibitory order is the first step in execution proceedings and the next step is for the judgment creditor to apply for sale of the land under O 43 r 11 of the Rules of the High Court 1980. The renewal or extension of the prohibitory order is essential in order not to interrupt the continuity of the validity of the prohibitory order. If the continuity is interrupted and the prohibitory order lapsed then, the sale of C the land in the execution proceeding cannot be carried out. Therefore, each application made by the plaintiff to renew or extend the prohibitory order is considered as 'steps taken to enforce a judgment over the asset of the defendant'. If the application to renew or extend it is made after the appointment of the special administrator on 9 September 1999, then s 41 D of the Danaharta Act is applicable. Section 41(1)(e) of the Act is much more clearer on this point ie no proceedings, execution or other legal process may be commenced or continued with against the affected person except with the prior written consent of Danaharta Corporation. In the present case, even though the legal process or the execution proceeding was commenced before the appointment of the special administrator, the E subsequent applications to renew or to extend the prohibitory order are considered as 'continuation' of the proceeding and therefore s 41(1) is still applicable if the applications were made after the appointment of the special administrator.

That being the case, the application made by the plaintiff to renew or F extend the writ of seizure and sale as well as the prohibitory order after the appointment of the special administrator for the 19 defendants on 9 September 1999 must be with the prior written consent of Danaharta Corporation. As a matter of fact in the present case, it is not disputed that the plaintiff has not obtained and failed to exhibit the existence of such consent.

G The plaintiff argued that at all relevant times when the applications were made, the defendant was represented by a solicitor from Tetuan Haniff & Rajendran and the said solicitor has given his 'consent' to all those applications. The said solicitor from Tetuan Haniff & Rajendran vide his letter dated 25 March 2002 (exh 'K' to encl 62A) has admitted that it was an oversight on his part to have given the consent to the application without H having obtained specific instruction from the special administrator.

The provision of the law on this point is crystal clear. The only consent that is required for any application under s 41(1)(d) and (e) of the Danaharta Act is 'the prior written consent of Danaharta Corporation'. That is trite law which cannot be disputed. There is no other form of I consent from any other person or authority that can substitute the said written consent of Danaharta Corporation. The only authority which can give the consent under the law is Danaharta Corporation and as provided

under s 41(7) of the Danaharta Act (as amended in 2000), any decision of the Corporation on this matter shall be final and binding and shall not be reviewed, quashed, appealed against or set aside by any court. Failure on part of the plaintiff to obtain the prior written consent of Danaharta Corporation would result in the applications and the relevant orders be null and void. Section 41(8) of the Act (as amended in 2000) also provides that any person who contravenes sub-s(1) commits an offence and shall on conviction be liable to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding three years or both. On this ground alone, the court has no hesitation to hold that the defendant's application vide encl 62 should be granted with costs.

Existence of special circumstances

The defendant also argued that the plaintiff has not adduced any evidence in the application to renew or extend the prohibitory order as to the existence of special circumstances to enable the court to renew or extend the prohibitory order in question. The defendant cited the case of *Ban Hin Lee Credit Sdn Bhd* to support their contention that the court can only renew a prohibitory order upon proof of existence of special circumstances and the court must be satisfied that there exists good reason before exercising its discretion to extend a prohibitory order. On this issue, I am of the opinion that the existence of 'special circumstances' is only relevant in cases where the applications are made in ordinary situation where the judgment debtor has not been placed under Danaharta under the Danaharta Act. In cases where the judgment debtor has been placed under Danaharta and a special administrator has been duly appointed, then the issue of 'special circumstances' becomes irrelevant. Under the Danaharta Act, particularly s 41, all such applications require the prior written consent of Danaharta Corporation, irrespective of whether there exists 'special circumstances' or not. If there is no prior written consent as required, the application and the subsequent order made by the court shall be invalid, notwithstanding that there are 'special circumstances' in existence at the time of the application.

Implementation of proposal approved by danaharta

In carrying out their duties under s 44 of the Danaharta Act, the special administrator has prepared a proposal with respect to the affected person, ie the defendant, particularly relating to the position of the creditors. The proposal was prepared on the findings that the defendant has no secured creditors at the relevant times. The proposal was later approved by Danaharta under s 45(2) of the Danaharta Act which provides:

> The Corporation may approve the proposal for implementation once the Corporation has received the proposal together with the Independent Advisor's report.

Section 46(4)(b) of the Danaharta Act provides further that if there are no secured creditors of the affected person known to the special administrator

A and Danaharta Corporation approves the proposal under s 42(2), the proposal shall be binding on the affected person, all members and creditors of the affected person and/any other person affected by the proposal, whether or not the person had knowledge or notice of the proposal. The said proposal was published in two local newspapers on 27 November 2001 as required under s 47(2) of the same Act. That being the case, the special B administrator is required by law and shall implement the proposal in accordance with its terms under s 47 of the Act. Section 47(3) of the Act also provides that, notwithstanding the provisions of any law or contract a proposal approved under the Act may be implemented and the special administrator shall have the power to implement and to do all things necessary to fully and effectively carry out and give effect to the proposal C without the need for any notice to or approval or consent of any member or creditor of the affected person or any other person affected by the proposal or approval or confirmation by the court.

The defendant contended that so long as the writ of seizure and sale and the prohibitory order are still on the register of the document of title of the D said land in question, the said proposal which the special administrator is duty bound to implement, could not be fully and effectively be carried out. If that happened, it may defeat the purpose of the Danaharta Act and the intention of the legislature is bound to fail.

The court fully agrees with the above contention, and decided that the E most appropriate action to be taken at the present stage is to set aside and to cancel the registration of the writ of seizure and sale as well as the prohibitory order as applied by the defendant in encl 62.

Abuse of the process of court

F It is not disputed that the three pieces of the land in question ie PN 2809 Lot 49649; PN 2816 Lot 49856 and PN 2817 Lot 49657 have been surrendered to the State Government as of April 2001 ie five months before the last application made by the plaintiff to renew or extend the writ of seizure and sale as well as the prohibitory order. The plaintiff has failed to inform the court about the matter and thus the order made by the court on G 28 September 2001 granting renewal or extension of the prohibitory order in respect of all the five pieces of land (including the three pieces which have been surrendered to the State Government) is misleading and surely could not be affected. By not informing the court of the actual position of the land and proceeded to apply for renewal or extension of the prohibitory order in respect of all those land, the plaintiff is abusing the process of court.

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The plaintiff was at all material times represented by solicitors. The said prohibitory order was renewed or extended for seven times since it was first issued on 16 October 1998. On the third to seventh applications for renewal, the plaintiff has stated as one of the reasons for such application that 'special administrator has been appointed for the defendant'. This I clearly shows that the plaintiff or the solicitors who was acting for the plaintiff knew that at that point of time, a special administrator has been appointed for the defendant. And yet in their affidavit opposing the

defendant's application, affirmed by Chua Eng Hai on 8 April 2002 (particularly paras 4 and 6) the plaintiff claimed that they have no knowledge about the appointment of the special administrator for the defendant. This clearly shows that the plaintiff is not sincere and not bona fide in dealing with this matter. Again the conduct of the plaintiff or the said Chua Eng Hai (representing the plaintiff) can be considered as an abuse of the process of the court.

In the same affidavit opposing the defendant's application (particularly para 11) the said Chua Eng Hai claimed that the intention of the plaintiff to get the prohibitory order renewed and extended from time to time is to maintain the '*status quo*' of the plaintiff's interest on the land in question.

The counsel for the plaintiff in their written submission strengthened this statement by submitting that the plaintiffs purpose in maintaining the validity of the prohibitory order was always to maintain the status quo existing before Danaharta's intervention on 9 September 1999. The counsel further submitted that 'this naturally gives and preserves the plaintiff's right to take action at the appropriate time against Danaharta and/or the special administrator for non-compliance with the express provisions of the Danaharta Act'.

Again, what the plaintiff is doing is clearly an abuse of the process of the court. From the above disclosures, I am of the impression that the prohibitory order was renewed or extended by the plaintiff for a collateral purpose ie to maintain the status quo in order to give or preserve the plaintiffs right to take appropriate action at the appropriate time against Danaharta and/or the special administrator for non-compliance with the express provisions of the Danaharta Act and not for the purpose of an execution of a judgment by way of seizure and sale. As provided by the Rules of the High Court 1980, a prohibitory order could only be issued in execution of a judgment or order involving the seizure of any immovable property of a judgment debtor. In *Mallal's Supreme Court Practice*, Vol 1 (2nd Ed) at p 225 it provides that:

The process of the court must be used bona fide and must not be misused. The court will prevent the improper use of the court process and will in a suitable case do so summarily where it has been used vexatiously and oppressively: *Castro v Murray* (1875) 10 Ex 213; *Dawkins v Prince Edward of Saxe Weimar* (1875–1876) 1 QBD 499.

In *Keystart Sdn Bhd v Forgetech Sdn Bhd* the High Court in Kuching has set aside the prohibitory order forthwith on one of the grounds that the lodging of the prohibitory order by the plaintiff merely to prevent the receiver and manager from selling the said land first, is clearly an improper use of the court process. It was also ruled in that case at p 1286 that:

> The rules clearly provide that the prohibitory order must be obtained in execution of a judgment or order, involving the seizure of the immovable property of a judgment debtor or any registered interest therein and not merely to prevent another party from disposing of the land as happened in our case.

A *Conclusion*

In the circumstances and for all the reasons stated, I find there is merit in the Danaharta's application as in encl 62. I will therefore allow the application with costs and order in term of prayers applied for.

B *Application allowed with costs.*

Reported by Hanim Kamaruddin

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